

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LIVEWARE PUBLISHING INC.,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 02-206-KAJ
)	
BEST SOFTWARE, INC., et al.)	
)	
Defendants.)	

MEMORANDUM ORDER

I. Introduction

This is another chapter in the ongoing war between Liveware Publishing, Inc. (“Liveware”) and Best Software, Inc. (“Best”) over their now shattered business relationship. Presently before me is Best’s request for sanctions against Liveware for violating the injunction earlier entered in this matter (the “Injunction”) and its request that the Injunction remain unchanged. That request stems from a press release and a website posting that Liveware made following my granting of a motion to reconsider the Injunction. I have determined that sanctions are appropriate and that the Injunction shall remain in place until either the conclusion of the litigation or a contrary order of this or a higher court.

II. Background

Without detailing facts which I have already related in earlier discussions of this case, suffice it to say that this dispute has been characterized by a truly extraordinary level of animosity. Liveware owns rights to report writing software at times referred to as “R&R” that has been used in conjunction with a software product owned and

marketed by Best that is known as “Abra Suite.” The license Liveware had granted to Best for the use of R&R is at the heart of the contention. At various times during the litigation, I and another judge who was earlier assigned to the case have had to give stern warnings to Liveware because it has apparently tried to improve its negotiating posture with potential clients who currently are Abra Suite users (sometimes called by the parties, the “end users”) and with Best’s so-called “Business Partners” by threatening copyright infringement litigation. In doing so, it has characterized proceedings in this court and has, at a minimum, implied that it has certain causes of action which will be forcefully litigated.

Having concluded that Liveware’s excesses were disrupting the proper and orderly resolution of this case, a related arbitration proceeding (the “Arbitration”), and a related action pending in the United States District Court for the Eastern District of Pennsylvania (the “PA Litigation”), I entered the Injunction on September 25, 2003. (D.I. 199.) Among other things, the Injunction forbade Liveware and its President, Mr. Daniel Levin, “from communicating in any way ... including ... through intermediaries, print media or electronic media, with Best Software’s Business Partners and Abra Suite end users regarding the status or subject matter of this litigation, the PA Litigation ..., and/or the Arbitration” (*Id.* at ¶ 2.) On February 4, 2004, the Arbitration concluded on terms largely favorable to Liveware. (See D.I. 230 at Ex. 1.) Liveware followed up on its victory by pressing a motion to reconsider the Injunction. (D.I. 203.) Following oral argument on February 27, 2004, I granted that motion with the following explicit direction:

I am going to reconsider it [the Injunction] based on the fact that I believe there is a difference today on changed events. The purpose of the injunction was to hold the status quo while the substance of the dispute was being resolved. While it has not been entirely resolved, there is a distinct difference between where the parties stand today and where they stood in September. Liveware has in its hand an arbitration award. Now, they may choose to refute their own win and say [“]if we can’t get the whole loaf, we are going to throw away ... [what] we got.[”] ... They may choose to do that for reasons good and sufficient to themselves.

* * *

The short answer is, I am granting the motion to reconsider. And I am open to reconsidering whether and what kind of injunctive relief for Best is appropriate to still keep the parties from ... disrupting the final resolution of the case here. I am open to talking about that.

I absolutely invite your thoughtful consideration and submissions on that point.

(Feb. 27, 2004 Transcript at 38-40.)

It may be that a more clearly stated ruling could have been framed, but I believe that any fair reading of the direction given to the parties shows that the September 25, 2003 Injunction remained in place until the parties had provided their suggestions on “whether and what kind of injunctive relief for Best is appropriate to still keep the parties from ... disrupting the final resolution of the case here.” (*Id.* at 39-40.) Mr. Levin was in the courtroom when that direction was given, and there can be no mistaking that he was aware of what was said.

Nevertheless, in spite of the explicit instructions given to the parties and in a continuation of the no-holds-barred mentality that elicited the injunction in the first instance, Mr. Levin took it upon himself to view the injunction as a nullity and to issue a press release and a web-posting that flagrantly violated the terms of the injunction. The press release proclaims, “Liveware Awarded \$1.3M in Arbitration Against Best Software!!” (D.I. 220 at Ex. A.) It goes on to describe itself as “vindicated” and Best as

having made “false assertions” and having, in effect, lied to customers to avoid the consequences of its breach of contract with Liveware. The press release concludes with a description of the PA Litigation, in which Liveware is suing one of Best’s Business Partners on the theory that the Business Partner “damaged Liveware’s business relationship with Abra Suite/R&R licensees by performing the unnecessary service of rebuilding R&R reports in another report writer, while knowing that continued use of R&R was in Liveware’s and those licensee’s interest.” (*Id.*)

In the “Open Letter to the R&R Licensee Community” posted on its website, Liveware again asserts, through Mr. Levin, that Best was intentionally hiding the truth from customers and that Best had engaged in a fraud on those customers. “Best certainly didn’t care about the needs of its own 10,000 or so Abra Suite licensees who rely on R&R reports,” Mr. Levin said, adding that, “[i]f Best had their way, they would have driven Liveware out of business just to avoid liability for Best’s wrongdoing.” Mr. Levin then encourages the 10,000 or so Abra Suite users to seek justice against Best in a class action lawsuit or by “some other means.” (*Id.*)

Best responded to Liveware’s action with an immediate application for sanctions against Liveware for violating the Injunction.

III. Discussion

I am presented with two questions. First, the question of sanctions, and, second, the question I had earlier asked the parties to comment on, namely what, if any injunctive relief is appropriate under the current circumstances. As to the first question, Liveware argues that no sanctions should be imposed because “Mr. Levin’s actions reflected a reasonable interpretation of Your Honor’s comments at the hearing of

February 27th, 2004[.]" and because "it appears that the granting of a motion to reconsider does mean a vacation of the order being reconsidered." (D.I. 228 at 1.) Neither of those assertions can stand serious review. It is true that I noted at the February 27th oral argument that at the Arbitration "the Best side lost, and lost large, and that there is now a very different posture in terms of what next steps are appropriate to resolve the disputes." (Feb. 27, 2004 Transcript at 17.) Apparently Mr. Levin took that to mean that he was free to do or say anything, including resuming his threatening posture towards third parties as a way of pressuring them and Best on issues that remain before this court. But Mr. Levin's faulty filter cannot be permitted to rule. When I stated that I would grant reconsideration of the Injunction and invited the parties thoughtful submissions on whether there should continue to be an injunction and, if so, what its contours should be, there was no reasonable basis for not believing that the parties were to obey the Injunction unless and until the reconsideration process that had just been granted at Liveware's behest had run the course of briefing, deliberation, and decision.

Mr. Levin's excuse that he mistook what was said is all the less credible since the press releases and webposting fit a sorry pattern of behavior in this case. As was detailed in a March 21, 2003 memorandum opinion, Liveware has had to be warned and re-warned,¹ from the earliest stages of the case, not to de-rail or improperly complicate

¹At the February 27th oral argument itself, counsel for Liveware had to be reminded that there is history of misbehavior by Mr. Levin and Liveware. Counsel commented that "the Court is under the impression that there has been a lot of acrimony in this case. The Court also appears to under the impression that the major source of that is Mr. Levin is overly emotional or overly invested in the case." (Feb. 27, 2004 Transcript at 4-5.) I later responded that: "Here is the problem with this, continues

the litigation process by threatening third parties and stirring up claims of tortious interference with contract. (See D.I. 173 at 3-5.) To say that Liveware's approach to this dispute has been aggressive does not begin to describe the level of animosity apparent in its behavior and the lack of control it has periodically exhibited despite the repeated urging of the court. It may well be that Liveware has the better argument on the merits and that it will one day be in a position to legally exact the several pounds of flesh it wants from Best and anyone who cooperated with Best in a way that offended Liveware. But it is not there yet, and, at the very least, Mr. Levin and Liveware are responsible for a gross error of judgment in reading my remarks on February 27th as saying Liveware could begin characterizing its rights as decided when they are not and begin dragging third parties into the mix again.²

That gross error is not ameliorated by Liveware's assertion that the public interest weighs in favor of lifting all restrictions on its communications about this case. Liveware has never been forbidden to have appropriate communications with the market. That has been made explicit more than once. (See Feb. 27, 2004 Transcript at 23-24.) Moreover, there is evidence that Liveware's problem is not that it cannot communicate to the market it wishes to reach but that it refuses to communicate unless

to be part of the problem with this case. ... [Y]ou said that [I] seem to be under the impression that Mr. Levin has been out of control. ... That's not an impression, quote-unquote. That's an on-the-record conclusion of fact I reached after multiple hearings with you people and reviewing documents and evidence and hearing testimony." (*Id.* at 25.)

²Ironically, the Arbitration award about which Liveware is so eager to tell Abra Suite end users and Best Business Partners is presently of questionable legal effect because Liveware itself appears on the verge of rejecting it. (See Feb. 27, 2004 Transcript at 27-28.)

it can make questionable assertions about its rights and the rights of those with whom it seeks to communicate. Liveware has previously taken positions that assume the conclusion they are here in this court trying to reach. (See D.I. 173 at 19-21.) Best claims that Liveware is at it again. Best says it has

on several occasions – as recently as two weeks ago [from March 15, 2004] – offered Lifeware the opportunity to issue a solicitation to Best Software’s customer base, so long as the solicitation advocated the benefits of Liveware’s products and did not attach Best Software of threaten its customers. On each occasion, Liveware rejected the offer, insisting that it had the right to “set the record straight” and inform Best Software’s customers of the need to cure their alleged copyright infringement.

(D.I. 229 at 2.) Of course, whether or not the end users or Business Partners need licenses from Liveware is a question which will be dramatically, and perhaps dispositively, answered by the outcome of the contract and copyright claims Liveware has asserted in this action. It thus assists no one, except perhaps Liveware, with its curious cart-before-the-horse view of dispute resolution, to say Liveware should be free to proclaim to the market that everyone without a license from Liveware is liable for copyright infringement.

The bottom line is that Liveware has violated the Injunction and did so in a manner calculated to pre-empt my opportunity to consider the parties’ positions on the modification, if any, that should be made to the Injunction. Consequently, Liveware will pay the costs associated with Best’s efforts to have the Injunction enforced. Best has submitted affidavit evidence of the expenditure of its resources, including attorney’s fees. (D.I. 227.) I find that the evidence submitted is credible and a reasonable reflection of the costs imposed on Best by Liveware’s wrongful conduct. Accordingly, I

will award Best the sum supported by its counsel's affidavit. See *Robin Woods Inc. v. Woods*, 28 F.3d 396, 401 (3d Cir. 1994) ("Just as attorneys' fee awards are 'remedial and designed to compensate complainants for losses incurred as a result of the contemnors' violations,' so too are awards to cover the other expenses involved in demonstrating violations. Thus, there can be no doubt that the district court had the authority to order ... [compensation] for the time and expense ... management incurred in enforcing the district court's injunction.") (internal citations omitted).

As to the question of the propriety of continuing the Injunction in this case, I have reconsidered the matter, as requested by Liveware and in light of the latest turn of events. Given the continuing lack of finality of the Arbitration award and indications that Liveware will seek to continue this case regardless of the award, and given Liveware's demonstrated penchant for seeking unfair advantage by pushing the litigation process out of ordinary and orderly bounds, I am persuaded that no modification of the Injunction is warranted. I think it can fairly be said in this regard that Liveware has managed to seize defeat from the jaws of victory.

Accordingly, it is hereby ORDERED that Liveware shall forthwith pay to Best the sum of \$11,781.50 and that the Injunction shall remain in effect in this matter.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

March 17, 2004
Wilmington, Delaware